

October 2006

**BEFORE THE
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of

**Digital Performance Right In Sound
Recordings and Ephemeral Recordings
For a New Subscription Service**

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) **Docket No. 2005-5 CRB DTNSRA**
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WRITTEN DIRECT TESTIMONY OF BARRIE KESSLER

QUALIFICATIONS

I am the Chief Operating Officer of SoundExchange, Inc. ("SoundExchange"). I have held this position since July 2001. Before I became Chief Operating Officer, I served as SoundExchange's Senior Director of Data Administration, beginning in November 1999. Prior to that, I worked as a database and technology consultant for the Recording Industry Association of America, Inc. ("RIAA") for seven years. There, I developed the software for the certification system for Gold, Platinum and Multi-platinum record sales, and created the royalty distribution system for the Alliance of Artists and Recording Companies ("AARC").

My responsibilities as SoundExchange's Chief Operating Officer include overseeing the collection and distribution of royalty payments for the performance of sound recordings on webcast, cable, and satellite services, including the services at issue in this proceeding. In this capacity, I supervise SoundExchange staff who receive royalty payments from licensees, determine the amounts owed copyright owners and performers, and distribute the royalties to those individuals and entities. Additionally, I oversee SoundExchange's license compliance

activities, manage its budget, and coordinate its systems requirements, development, and testing.

A statement of experience is attached to my testimony.

OVERVIEW

I am providing this testimony to the Copyright Royalty Board ("CRB") in order to give the Board background on how SoundExchange collects and distributes royalties. I previously testified in the CRB's proceeding to set rates and terms for webcasting for the 2006-2010 license period, Docket No. 2005-1 CRB DTRA. SoundExchange is submitting that testimony and all related exhibits as designated testimony in this proceeding pursuant to 37 C.F.R. § 351.4(b)(2). Rather than repeat that testimony, I reaffirm and incorporate it here, as the central points I made in that testimony apply with equal force in this proceeding.

I am also submitting this testimony to request that SoundExchange remain the sole collection and distribution agent, to express my view that the existing regulations should be amended to account for the additional issues discussed in my testimony in Docket No. 2005-1 CRB DTRA, and to provide factual support for SoundExchange's position that neither the Sirius-EchoStar service nor the Capstar service is entitled to the rates available for Preexisting Subscription Services ("PES").

DISCUSSION

I. SOUNDEXCHANGE'S COLLECTION AND DISTRIBUTION OF ROYALTIES

My written direct testimony in Docket No. 2005-1 CRB DTRA provided an overview of SoundExchange, a description of its royalty collection and distribution systems, and a discussion of some of the challenges that SoundExchange faces. It also described the extent of SoundExchange's royalty distributions to date. As noted above, SoundExchange has designated that testimony in this proceeding, and I reaffirm it here.

II. A SINGLE COLLECTIVE SHOULD BE DESIGNATED TO COLLECT AND DISTRIBUTE ROYALTIES.

As a practical matter (and generally as a legal matter as well), SoundExchange (or its precursor) has operated as the sole collection and distribution agent for royalties under the Section 112 and 114 licenses. No other collective has filed to participate in this proceeding. Thus, once again, SoundExchange is the only advocate for copyright owners and performers, and is the sole entity seeking designation to collect and distribute royalties on their behalf. For the reasons stated in my written direct testimony in Docket No. 2005-1 CRB DTRA, I believe the designation of a single collective is preferable to and far more efficient than a multiple agent system.

III. MODIFICATIONS NEEDED TO LICENSE TERMS

In my testimony in the webcasting proceeding, I recommended a number of changes to the terms governing the operation of eligible nonsubscription transmission services and new subscription services. SoundExchange's experience over the past several years demonstrates that a few of the terms found in 37 C.F.R. Part 262 must be modified to facilitate the prompt, fair and efficient administration of the statutory licenses. I propose that those same terms be modified in this proceeding as well in order to promote the statute's overall goal of providing fair compensation to artists and record labels. SoundExchange requests that the CRB modify the terms accordingly.

I also want to reiterate briefly SoundExchange's long-standing request for census reporting. SoundExchange has previously submitted extensive comments on recordkeeping and, in particular, the need for census reporting in response to the Copyright Office's and the Board's notice and requests for comments in connection with their rulemakings on recordkeeping. I will not belabor what we have said in those submissions, but I emphasize here that accurate data is

critical to the integrity of the collection and distribution process that I have described above. As SoundExchange's comments explain, receiving reports of use in census form and in a uniform format is the only way to ensure that copyright owners and performers receive accurate payments for the use of their sound recordings. In Docket No. RM 2005-2, SoundExchange submitted a Declaration from Barry Massarsky, the President of an economic consulting firm, which discussed some of the inadequacies of sampling that would result in copyright owners and artists being underpaid. I am attaching that Declaration here as further support in this proceeding. *See* SX Ex. 001 DP.

In addition, SoundExchange would like to ensure that the Board makes clear that the definition of revenues for any of the licenses should include in the base of revenues against which a percentage is to be applied all revenues "paid or payable." We have had experience with services not collecting revenues from third parties (either as a de facto discount or possibly in exchange for some other consideration). The result is that some revenue that should be attributed as part of the revenue base is hidden and thus not counted. That is not fair to artists and record companies on whose behalf SoundExchange is collecting royalties.

IV. THE SIRIUS-ECHOSTAR SERVICE

I am aware that the Register of Copyrights recently issued an Order that compels the conclusion that Sirius's service over EchoStar's DiSH Network is not a PES. In briefing that issue to the CRB and the Register, Sirius claimed, among other things, that SoundExchange had "acquiesced" to Sirius's claims by accepting and depositing royalty payments from EchoStar. I am providing this additional testimony to demonstrate the falsity of Sirius's claim.

It appears that Sirius began making transmissions over the EchoStar network in the spring of 2004. At that time, Sirius did not inform SoundExchange directly; rather, Sirius filed a

Notice of Use of Sound Recordings under Statutory License with the Copyright Office (but not with SoundExchange) that checked virtually every box on the form. As I noted in my prior testimony, however, filing a Notice of Use does not mean that a service is actually making transmissions of any particular kind, and SoundExchange does not necessarily know that a service is making transmissions -- or what types of transmissions it is making -- when it receives payments, statements of account, and reports of use from a service.

Sirius did not, however, pay SoundExchange for its EchoStar transmissions at all until May of 2005 -- approximately a year after it apparently started being carried on the EchoStar network. Even at that time, and to this day, Sirius did not indicate to SoundExchange that it was claiming that its service over the EchoStar Network was eligible for the PES rates in 37 C.F.R. Part 260. In violation of the regulations governing the PES (as well as similar regulations governing new subscription services), Sirius provided no Statement of Account and no information about how the royalties were being calculated. Rather, Sirius simply sent checks with the legend "Sirius-EchoStar." In addition, if Sirius was seeking to claim the benefits of the PES statutory license, then it would have been required by 37 C.F.R. Part 260.4(b) to submit monthly statements of account on a form provided by the designated agent (SoundExchange). Sirius failed to do so.

In the summer of 2005, SoundExchange's general counsel repeatedly sought clarification from Sirius concerning the basis on which Sirius was paying for its EchoStar service. Sirius indicated that it would provide additional information about how Sirius was paying, but repeatedly failed to do so. Sirius then filed a written direct statement in Docket No. 2005-1 CRB DTRA indicating that it believed that its EchoStar service was eligible as a PES. That statement

-- at least in the public version that I have been allowed to see -- did not explain how Sirius was calculating its royalty payments.

Since that time, Sirius has continued to make payments apparently claiming to be a PES, but, in violation of the statute and regulations, it has refused to provide Statements of Account for any of its payments. It is not enough to make payments. A service operating under Part 260 must comply with its terms. *See* 37 C.F.R. Part 260.1(b). Sirius has also refused to explain how it is calculating its royalty payments. In response to each payment, SoundExchange has informed Sirius in writing that Sirius's position that its EchoStar service is eligible for the PES rate is without merit, that Sirius is in violation of the statute and regulations, and that SoundExchange's acceptance of partial payment of Sirius's true liability (once ultimately determined) was not a waiver of SoundExchange's legal position or remedies (or the remedies of copyright owners and performers). I am providing the correspondence between SoundExchange and Sirius as an exhibit. *See* SX Ex. 102 DR.

Thus, at no point has SoundExchange ever acquiesced to Sirius' claims. Rather, SoundExchange has, for more than a year, maintained that the EchoStar service is not eligible for the PES rate, and has sought the basis on which Sirius was paying royalties, but Sirius has utterly refused to provide any such basis.

V. THE THP CAPSTAR/DMX SERVICE

I am aware that DMX has not filed a petition to participate in this proceeding. Nonetheless, if the Board determines as a factual matter in Docket No. 2006-1 CRB DSTRA that THP Capstar (which apparently recently changed its name to DMX) is not a successor to DMX, then DMX may be subject to the rates and terms established in this proceeding. In an abundance of caution, I would like to provide the Board with the following information and to emphasize

that SoundExchange has always taken the position that Capstar is not entitled to the rates available for Preexisting Subscription Services. *See* SX Ex. 002 DP (Referral Motion and Exhibits, May 4, 2006).

In February 2005, one of the specifically identified PES -- DMX Music, Inc. -- filed a chapter 11 petition in the United States Bankruptcy Court for the District of Delaware. In the Bankruptcy Court, SoundExchange objected to DMX's efforts to assign its PES Compulsory License, and DMX stated in court that it never intended to assign the license. *Id.*

Capstar purchased a portion (but not all) of DMX's assets from the bankruptcy estate. In doing so, it (1) denied that it was a successor to DMX, (2) specifically excluded the PES Compulsory License from the list of obligations it was assuming, and (3) disclaimed any responsibility for the approximately \$2.6 million in statutory royalties that DMX owed to SoundExchange. *Id.* Portions of the record in the bankruptcy proceeding are included in SX Ex. 002 DP.

After purchasing those assets and denying DMX's liabilities, Capstar then reversed course and filed a Notice of Use of Sound Recordings Under Statutory License with the Copyright Office, claiming eligibility for the PES Compulsory License. Capstar also filed a Notice of Intent to Participate in Docket No. 2006-1 CRB DSTRA, again claiming that it was a PES. *Id.*

SoundExchange has consistently informed Capstar that it believes that Capstar is not a successor to DMX and not entitled to the rates available for Preexisting Subscription Services. I am attaching as an exhibit letters that SoundExchange has sent to Capstar in which SoundExchange repeatedly made its position very clear and expressly reserved its rights and the rights of its copyright owner members to pursue claims against Capstar/DMX for improperly

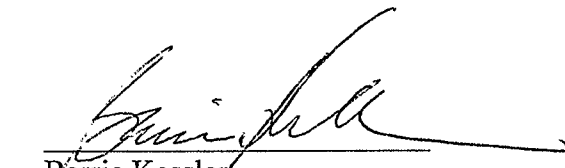
claiming the benefits of a Preexisting Subscription Service. *See* SX Ex. 101 DR (correspondence).

CONCLUSION

SoundExchange has developed an effective and efficient mechanism for accomplishing the enormous task of collecting and distributing royalties for the hundreds of millions of sound recordings performed annually under Sections 112(e) and 114 of the Copyright Act. To maximize that distribution of royalties, SoundExchange should remain the sole collection and distribution agent. The existing regulations should also be amended to account for the additional issues discussed in my testimony in Docket No. 2005-1 CRB DTRA. In addition, neither the Sirius-EchoStar service nor the Capstar service is entitled to the rates available for Preexisting Subscription Services.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.

Date: 10/27/06


Barrie Kessler



Bio

Chief Operating Officer Barrie Kessler

Barrie Kessler has been SoundExchange's COO since July of 2001. As COO, she manages the infrastructure and personnel of the organization and implements various strategies to maximize the overall collection and distribution of royalties to SoundExchange's labels and artists.

Ms. Kessler brought over 15 years of database design and integration to SoundExchange, having served as principal consultant for numerous national and international corporations, including many within the U.S. sound recording industry. As the chief operating officer and information specialist for SoundExchange, she spearheaded the design and implementation of the Royalty Distribution System. Ms. Kessler is also charged with quality assurance of performance log administration. She provides technical expertise regarding reporting requirements both internally and before the Copyright Office. The evaluation of emerging and existing technology solutions for webcast performance tracking and assisting licensees with reporting compliance with the statutory license granted by the Digital Performance Right in Sound Recordings Act of 1995 (DPRA) and the Digital Millennium Copyright Act (DMCA) are conducted under Ms. Kessler's leadership.

Prior to SoundExchange, she served as Principal of Rock Creek Systems, an information technology consulting firm, where Ms. Kessler oversaw systems and database design, knowledge management, programming and data analyses for clients. Notable projects include the development of a broadcast monitoring data collection and reporting system for collecting rights societies, record companies, artists and governments in Brazil and Argentina and implementing the technology for establishing a database for a centralized musical recordings warehouse. As part of her consulting for RIAA programs, Ms. Kessler developed the certification system for Gold, Platinum and Multi-platinum record sales and created the royalty distribution system for the Alliance of Artists and Recording Companies (AARC).

Ms. Kessler's previous work included serving as Director of Systems for RSA, Inc. in Washington, D.C. where she directed project teams that provided

analytical and application design services to corporate clients. In that capacity, she created EIS systems for automating workflow and billing information for a major photojournalism corporation. She was also responsible for all aspects of the company's network administration.

Ms. Kessler also has extensive experience abroad having served two years as a database consultant for Price Waterhouse and DOS Computer Center in Madrid, Spain.

Ms. Kessler holds a Bachelor of Science degree in accounting and economics from Lehigh University.

Exhibits Sponsored by Barrie Kessler

Exhibit No.	Description
SX Ex. 001 DP	Declaration of Barry M. Massarsky in Docket No. RM 2005-2 (Aug. 26, 2005)
SX Ex. 002 DP	Motion by SoundExchange for Referral of Novel Material Question of Substantive Law Concerning the Preexisting Subscription Service Compulsory License in Docket No. 2006-1 CRB DSTRA (May 4, 2006)
SX Ex. 101 DR	SoundExchange correspondence with DMX Music (RESTRICTED)
SX Ex. 102 DR	SoundExchange correspondence with Sirius Satellite Radio Inc. (RESTRICTED)